COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2014-SC-000555

KATHY McABEE — APPELLANT

VS.

Appeal from Kentucky Court of Appeals
Case No. 2013-CA-001677-MR
Hopkins Circuit Court, Action No. 11-CI-387

DARREN C. CHAPMAN, M.D. — APPELLEE

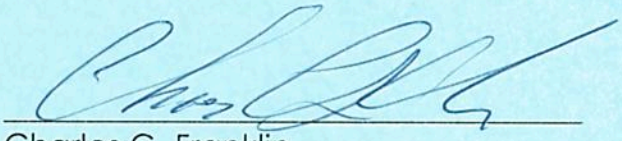
BRIEF FOR APPELLEE, DARREN C. CHAPMAN, M.D.

Submitted by:

Charles G. Franklin
FRANKLIN, GORDON & HOBGOOD
24 Court Street
P. O. Box 547
Madisonville, KY 42431
Phone: 270-821-7252
Fax: 270-821-2360
Email: charliefranklin@bellsouth.net

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this Brief were served upon the following by mailing same, first class postage prepaid, on the 25th day of November, 2015: Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. James C. Brantley, Judge, Hopkins Circuit Court, Justice Center, 120 E. Center Street, Box 1, Madisonville, KY 42431; and Charles S. Wible, 324 St. Ann Street, Owensboro, KY 42302. The undersigned does also certify that the record on appeal was not withdrawn.



Charles G. Franklin

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Darren C. Chapman, M.D., submits that the issues have been fully briefed, and that the law and record clearly demonstrate that the trial court did not abuse its discretion.

Should this Court determine that oral arguments would be helpful, Appellee welcomes the opportunity to discuss these issues with the Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Kathy McAbee filed this action April 28, 2011, alleging medical negligence in the performance of a surgical procedure (Complaint, R. 1-3). Dr. Chapman denies that he was negligent (Answer, R. 7-12).

A jury trial began on August 20, 2013, in the Hopkins Circuit Court, with Judge James C. Brantley presiding. On the 2nd day of trial, at the request of the undersigned counsel, the Court invoked the "rule" for separation of witnesses but, consistent with the request, separation was only as to lay witnesses, not expert witnesses. The initial discussion took place in chambers, off the record, and counsel for Appellant agreed.

Following the off the record discussion, the Court asked counsel to approach the bench to put the agreement regarding separation of witnesses on the record (VR Day 2: 08/21/13; 10:05:05) (Appendix, Tab A). At that time, Appellant's counsel apparently changed his mind, and indicated that after further thought, he would prefer an across the board exclusion (VR Day 2: 08/21/13; 10:05:38) (Appendix, Tab A). The Court then indicated it would rule on the issue at lunch. The cross-examination of Ms. McAbee followed this discussion. Dr. Chapman was the next witness called by Appellant, and testified until a lunch break was taken.

Following the lunch break, another discussion was held in chambers, off the record, regarding available law. Subsequently, these issues were again addressed on the record. Appellee stated

on the record that expert witnesses were not fact witnesses, and were "essential to the management" of the case (VR Day 2: 08/21/13; 12:51:12) (Appendix, Tab B). The response of Appellant's counsel on this issue was that he thought experts would be testifying as to facts as shown by medical records (VR Day 2: 08/21/13; 12:51:34) (Appendix, Tab B). Neither party went into great detail on the record, as the issue was addressed at length in chambers.

The Court ruled that any and all expert witnesses would be allowed to remain in the courtroom (VR Day 2: 08/21/13; 12:52:23–12:53:34) (Appendix, Tab B).

Appellant's counsel immediately indicated he would invite his expert, Dr. Ira Kodner, into the courtroom (VR Day 2: 08/21/13; 12:53:36) (Appendix, Tab B). Dr. Kodner observed the continued examination of Dr. Chapman by Appellant's counsel, prior to being called as a witness.

All of the expert witnesses – Dr. Kodner for Appellant, and two experts for Appellee – were in the courtroom during portions of the trial and heard testimony of other witnesses. The Court's ruling excepting experts from exclusion was applied fairly and equally to both parties.

Despite the Court's sequestration of lay witnesses (VR Day 2: 08/21/13; 12:53:30) (Appendix, Tab B), two of Appellant's lay witnesses – Sallie Carlton (Appellant's daughter) and Linda Gentry – violated the rule. For this reason, Appellee objected to the testimony of Sallie Carlton;

however, the Court allowed her to testify (VR Day 3: 08/22/13; 10:17:57 – 10:19:40).

The 4-day trial resulted in a jury verdict in favor of Dr. Chapman (Jury Instructions and Verdict, R. 330-334). Judgment was entered (Trial Judgment, R. 335-337) (Appendix C), consistent with the jury verdict.

Ms. McAbee appealed, arguing a solitary evidentiary issue: Whether expert witnesses should have been exempt from sequestration.

The Court of Appeals, after reviewing the record and existing law, affirmed the Hopkins Circuit Court on August 22, 2014 (Appendix D).

ARGUMENT

I. STANDARD OF REVIEW

Appellant challenges the Hopkins Circuit Court's ruling excepting expert witnesses from separation under Kentucky Rule of Evidence 615(3). The scope of review is abuse of discretion.

> In reviewing the trial court's ruling on evidentiary issues, the appellate court applies an abuse of discretion standard.

Summe v. Gronotte, 357 S.W.3d 211, 213 (Ky. App. 2011), citing *Barnett v. Commonwealth*, 317 S.W.3d 49, 61 (Ky. 2010).

A trial court's decision is only an abuse of discretion if it is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Greer v. Hook,* 378 S.W.3d 316, 319 (Ky. App. 2012), citing *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 1007).

Unless there is a "flagrant miscarriage of justice", the trial court should be affirmed. *Greer,* at 319 (citing *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

II. THE TRIAL COURT'S DECISION WAS NOT ARBITRARY, UNREASONABLE, OR UNFAIR

KRE 615 states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
>
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause. (emphasis added)

The record demonstrates that the Trial Court's decision was not arbitrary or unreasonable; discussion and argument was conducted both in chambers and on the record; and both parties were allowed ample opportunity to state their positions.

The Trial Court ordered separation of lay witnesses upon request of counsel, consistent with the rule, and Appellee submitted that expert witnesses were exempt as essential to the management of the case, pursuant to KRE 615(3). Appellant initially agreed with this position.

After the initial discussion in chambers, Appellant's counsel changed his mind ("after further thought") and requested sequestration for all witnesses. Appellant's counsel offered no argument for his opposition; however, the Court allowed the parties to research the issue further and indicated case law would be consulted and there would be a ruling at the lunch break. (Appendix, Tab A)

Both parties were given another opportunity to advocate their positions in chambers, and put their respective positions on the record, followed by the ruling of the Trial Court.

The record reveals the Trial Court gave careful consideration to the issue; allowed each party to be heard multiple times, both in chambers and on the record; and did not act arbitrarily or unreasonably in ruling that expert witnesses would be exempt from the separation rule.

The Court's ruling was also fairly and equally applied, particularly because it evenhandedly afforded expert witnesses for both parties to hear the testimony of other witnesses.

Appellant's expert (Dr. Kodner) was given the same opportunity as Appellee's experts to observe the testimony of witnesses, and Appellant took immediate advantage of the ruling by inviting Dr. Kodner into the Courtroom to observe the remainder of Dr. Chapman's testimony.

There was a proper, reasonable, and fair exercise of discretion in this case, and this ruling should not be disturbed on appeal.

> Whether a witness is essential, is and will remain under the discretion of Kentucky's trial judges. This Court will not attempt to supplant its judgment therein and abdicate a time honored judicial tradition of allowing a trial judge to be the arbiter of the decisions placed before it.

Hatfield v. Commonwealth, 250 S.W.3d 590, 594 (Ky. 2008).

III. THE HOPKINS CIRCUIT COURT RULING AND KENTUCKY COURT OF APPEALS OPINION WERE SUPPORTED BY SOUND LEGAL PRINCIPLES.

Appellee respectfully submits that both the Hopkins Circuit Court and the Kentucky Court of Appeals are soundly supported by Kentucky Rule of Evidence 615, and case law existing at the time of their decisions.

A. THE UNDERLYING PURPOSE AND SPIRIT OF KRE 615 WAS NOT VIOLATED

The purpose of the separation of witnesses rule is to prevent a witness from hearing the testimony of another with the result that he/she would change or conform his testimony to other witnesses.

> The reason for the adoption of the rule is to prevent the witnesses excluded from hearing the testimony of other witnesses with the possible result that the testimony of the others might lead the witness to answer in such manner as to conform with other testimony, even though, as if often the case, the witness herself is not conscious of this subtle influence.
>
> Additionally, it is stated that "the purpose behind the separation of witness rule is to insure the integrity of the trial by denying a witness the opportunity to alter his testimony."

Smith v. Miller, 127 S.W.3d 644, 646 (Ky. 2004) (citing *Speshiots v. Coclanes*, 224 S.W.2d 653, 656 (1949) and *Reams v. Stutler*, 642 S.W.2d 586, 589 (Ky. 1982).

There is no allegation here that any expert witness altered or "conformed" his testimony to that of other witnesses. There is no argument that any expert presented false or fabricated testimony.

The witnesses exempted by the Court from exclusion were not fact witnesses; had no first-hand knowledge of facts; and did not play any role in the care and treatment of the patient. The witnesses exempted were retained as experts to offer opinion testimony and testified in an expert capacity only. They gave opinions based on review of records and the testimony (both in-court and via deposition) of other witnesses ("facts"). There was no simply no reason to sequester them.

> We perceive little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case. As Professor Wigmore's treatise summarizes:
>
> The process of sequestration consists merely of preventing one prospective witness from being taught by hearing another's testimony . . . .
>
> Theoretically at least, the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury.

Morvant v. Construction Aggregates Corp., 570 F.2d 626, 629-30 (6th Cir. 1978), citing 6 *Wigmore on Evidence* §1838 at 461 (Chadbourn rev. 1976.).

There is no allegation in this appeal that any expert was "taught" by hearing other testimony.

> As experts they would be testifying solely as to their opinion based on the facts or data in the case, and, accordingly, were properly exempted from the exclusion of witness order. Because the experts were not witnesses whose recollections might have been colored by accounts of prior witnesses, there was no prejudice.

Mayo v. Tri-Bell Industries, Inc., 787 F.2d 1007, 1013 (5th Cir. 1986), citing *Morvant, supra*, at 629-30, and *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902, 910-911 (2d Cir. 1985).

The spirit of KRE 615 was not violated; the long-accepted reasons for sequestration are simply not applicable to expert witnesses with no personal knowledge of facts.

B. KRE 615(3) DOES NOT AUTHORIZE EXCLUSION OF PERSONS SHOWN TO BE ESSENTIAL

While there is no automatic exemption for expert witnesses, the language of CR 615 does "not authorize" exclusion of persons who are shown to be essential. The Rule requires a showing of essentiality to the party's cause, and an exercise of discretion by the Trial Court. Kentucky's appellate courts recognize the exception set out in KRE 615(3).

> Clearly, the impetus of KRE 615(3) is to validate the longstanding and fundamental practice of separation of witnesses, while upholding the authority of a trial judge to tailor that obligation under her discretion in situations that she deems of merit. Thus, those situations of merit will ultimately be circumstances wherein a witness is essential to effectively further a party's cause.
>
> However, there must be a *showing* that the witness is essential to furthering a party's cause.

Hatfield, at 594.

Appellee made the required showing (in chambers and on the record) by offering that expert witnesses would not be testifying as to facts, and further that expert witnesses were essential to the management of the case (VR Day 2: 08/21/13; 12:51:12) (Appendix B).

It is axiomatic that expert witnesses are essential to the management of medical malpractice trials. Their "opinion" testimony is required in most medical malpractice cases and is necessarily based on "facts" as testified to by the parties and other witnesses with firsthand knowledge, as well as review of medical records.

While Appellant criticizes the "showing," Appellee submits that he made a fair and reasonable showing on the record and in chambers. Thereafter, Appellant was given an opportunity to state her position on the record. The only statement in opposition was that experts would be testifying as to facts as shown by medical records (VR Day 2: 08/21/13; 12:51:34) (Appendix, Tab B).

Appellant never argued she would be prejudiced by the ruling allowing all experts to observe the testimony of other witnesses. In fact, Appellant took immediate advantage of the Court's ruling by inviting her expert (Dr. Kodner) into the courtroom to observe testimony.

The Federal Rules of Civil Procedure have an identical rule at 615(3), and in *Morvant*, the Sixth Circuit Court of Appeals held:

> . . . where a fair showing has been made that the expert witness is in fact required for the management of the case,

> and this is made clear to the trial court, we believe that the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel.

Morvant, at 630.

Appellee made a reasonable showing and it was accepted by the Trial Court after careful consideration.

C. EXISTING CASE LAW SUPPORTED THE TRIAL COURT AND KENTUCKY COURT OF APPEALS

Kentucky case law was sparse when this case was tried with regard to the application of KRE 615(3) to expert witnesses.

In 1950, Kentucky's then highest Court found no error in allowing an expert to testify at trial after he had been allowed to remain in the courtroom as a representative of the company. *Johnson v. Mutual Benefit Health & Accident Ass'n*, 229 S.W.2d 758, 761 (Ky. 1950).

Due to the identical Rule in the Federal Rules of Civil Procedure, the Sixth Circuit Court of Appeals decision in *Morvant* was discussed in chambers at the Trial Court level, and it as well as other Federal Court cases have been cited by the parties in the appellate process, and also by the Kentucky Court of Appeals in its Opinion.

In support of her argument, Appellant cites two Federal cases as authority. In one of those cases, *Opus 3 Limited v. Heritage Park, Inc.*, 91 F.3d 625 (4th Cir. 1996), the Court stated "the district court did not abuse its discretion" when it ruled an expert was not exempt from sequestration;

however, the Court expressly noted the witness was sequestered because he was a key fact witness, **not** because he was an expert. *Opus,* at 629.

The Kentucky Court of Appeals also looked to the Federal Courts, specifically the Sixth Circuit Court of Appeals, for guidance and cited *U.S. v. Phibbs*, 999 F.2d 1053, 1073 (6th Cir. 1993) ("[t]he essential witness exception set out in Rule 615(3) 'contemplates such persons as an agent who handled the transaction or an expert needed to advise counsel in the management of the litigation'") and *U.S. v. Martin*, 920 F.2d 393 (6th Cir. 1990) ("the prosecutor would still have to reveal to him what other witnesses had said and done in order to map out strategy. This [revelation] would defeat the whole purpose of sequestration.").

Appellee submits two Federal cases in which an abuse of discretion was found in excluding an expert from the Courtroom – *United States v. Seschillie*, 310 F.3d 1208 (9th Cir. 2002), and *Malek v. Federal Insurance Co.*, 994 F.2d 49 (2nd Cir. 1993).

The *Seschillie* Court stated "the district court should have considered the explanation" that the expert needed to hear testimony to provide opinion evidence. *Seschillie*, at 1214.

The instant case is similar to *Seschillie* in that both of Appellee's expert witnesses were able to hear firsthand the testimony of Myrna Borders, the Certified Registered Nurse Anesthetist who participated in the surgery. Plaintiff's expert, Dr. Kodner, could have been in the courtroom

to hear this testimony if Plaintiff had so desired. CRNA Borders was not deposed for discovery prior to trial, and her factual testimony was of great importance to Appellee's position.

The *Seschillie* Court further noted:

> Unlike an expert excluded because he is both an expert witness and a fact witness, Gieszl was not a fact witness. These circumstances favor allowing Gieszl to observe trial: "An expert who is not expected to testify to facts, but only assumes facts for purposes of rendering opinions, might just as well hear all of the trial testimony so as to be able to base his opinion on more accurate factual assumptions." (citing *Opus*, 91 F.3d at 629).
>
> * * *
>
> Rule 615, however, authorizes exclusion "so that [witnesses] cannot hear the testimony of other witnesses," not for other reasons. Also, the exception contained in Rule 615(3) is for persons "essential to the presentation of the parties' cause." If a person meets that criterion, exclusion is "not authorized."

Seschillie at 1214, citing Rule 615.

In *Malek*, the 2nd Circuit Court of Appeals found error in the district court's sequestration of an expert, indicating that the witness:

> . . . was not "a fact witness whose recollection might have been colored" by the testimony of other witnesses; rather, he was an expert whose assistance was important to the presentation of plaintiffs' case and who should have been permitted to remain in the courtroom.

Malek, at 54, citing *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902 (2nd Cir. 1985), at 911.

The *Malek* Court further noted that because the adversary's expert's testimony differed from his reports, the presence of Malek's

expert in the courtroom during the testimony was important to the presentation of the case (*Malek* at 54).

Like *Malek*, the adversary's expert (Dr. Kodner) offered new and different theories and criticisms at trial than those he revealed in his discovery deposition. At trial, Dr. Kodner agreed that he reviews a chart over and over, is compulsive, and usually finds new criticisms upon each review (VR Day 2: 08/21/13; 02:36:40 – 02:38:10), candidly admitting he had opinions not expressed in his discovery deposition.

During the discovery deposition of Dr. Kodner, he discussed the Vanderbilt surgery, reading from the Vanderbilt records, and with regard to an important diagnostic study performed there, testified "probably don't need to dwell on that." (Kodner deposition; 02/08/13, p. 47).

However, at trial, the Vanderbilt records and surgery were central to Dr. Kodner's criticisms of Dr. Chapman, and Dr. Kodner postured they were consistent with his theories of negligence.

During his discovery deposition, Dr. Kodner seemed to understand the Vanderbilt surgery, yet at trial he seemed confused about what actually occurred at Vanderbilt (VR Day 2: 08/21/13; 03:20:22 – 03:20:56).

Despite being unsure about what occurred, Dr. Kodner drew medical illustrations during his direct testimony of his understanding of the three main surgeries (including the Vanderbilt surgery), "explaining" as he drew them (VR Day 2: 08/21/13; 01:34:45 – 01:46:45). These were not

available until Dr. Kodner's trial testimony. Dr. Shuttleworth was present in the courtroom for this "courtroom made" evidence, and felt they incorrectly depicted the surgeries. As a result, Dr. Shuttleworth was able to make his own drawings during his direct examination, explaining his interpretation of the surgeries, based on the operative reports, and his opinions. (There were no objections made to this evidence by either party.)

Appellee also directs the Court to *United States v. Mohney*, 949 F.2d 1397 (6th Cir. 1991) and *United States v. Lussier*, 929 F.2d 25, 30 (1st Cir. 1991), wherein it was held there was no abuse of discretion in allowing experts to remain in the courtroom. In *Lussier*, the court stated:

> . . . it is clear that his testimony was based on, summarized, and was consistent with the evidence presented at trial, and that there would have been "little, if any reason" to sequester him. Lussier was not prejudiced by the decision to allow Soares to remain in court, which consequently was not an abuse of the district court's discretion.

Lussier, at 30, citing *Morvant* at 629-30 and *United States v. Jewett*, 520 F.2d 581, 584 (1st Cir. 1975).

Trial courts in other jurisdictions have exempted expert witnesses from the sequestration rule, and it was not error to do so. *Martin v. Porak*, 638 P. 2d 853 (Colo. App. 1981) ("[T]he doctor testified in an expert capacity only and not to the facts of the case. There would be little reason, if any, to have him sequestered. Thus, we hold that the denial of the sequestration request was not reversible error."); *State of South*

Dakota v. Traversie, 387 N.W.2d 2 (S.D. 1986) ("[If the witness is to base his expert opinion on facts or data presented at trial, the expert should be exempt from sequestration."); *R. R. Donnelley & Sons v. North Texas Steel*, 752 N.E.2d 112 (Ind. App. 2001) ("Thus, we find that the trial court abused its discretion by failing to exempt experts from the Separation Order.").

The decision of the Trial Court and the Kentucky Court of Appeals' Opinion were appropriate and reasonable in light of Kentucky and Federal case law in existence at the relevant time.

D. *SPEARS* SHOULD NOT BE APPLIED TO THIS CASE RETROACTIVELY

Appellant relies heavily on *Spears v. Commonwealth*, 448 S.W.3d 781 (Ky. 2014), a case decided subsequent to Opinion of the Kentucky Court of Appeals, and well after the trial of this case.

Spears is distinguishable because it was a criminal case, and because defense counsel in that case requested that his expert be allowed to sit at the defense table to assist in cross-examining an expert.

In contrast, Appellee did not seek to or utilize an expert as an "elbow expert" for cross-examination purposes. Appellee requested in the instant case that all expert witnesses be exempt from separation as essential, and be allowed to hear the testimony regarding the facts, upon which their opinions would be based. This would allow the experts for both sides to hear the same facts as the jury heard.

The *Spears* opinion also indicates the trial court denied the request for the expert to be present because he was not present when other witnesses testified. In contrast, Appellee's expert (Shuttleworth) was present for all of the testimony from the 2nd day of trial (when the court exempted experts) through the last day of trial.

The analysis set out in *Spears* was not available to the Trial Court nor the Kentucky Court of Appeals, and should not be applied retroactively. Allowing retroactive application ". . . would virtually prevent finality of litigation and leave all judgments subject to later attack . . . ." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997).

The Judgment in the case at bar was final well before the *Spears* decision, and should not be overturned on appeal.

> To permit otherwise would wholly vitiate the finality of judgments in that each change in the law would allow or require relitigation of the facts and law of every case.

Campbell v. Commonwealth, 316 S.W.3d 315, 320 (Ky. 2009).

IV. THERE WAS NO PREJUDICE AND NO FLAGRANT MISCARRIAGE OF JUSTICE.

Appellant cannot demonstrate any prejudice nor show that allowing experts to observe the testimony "undermined the integrity of the fact finding process." *Hatfield*, at 596 (quoting *United States v. Kosko*, 870 F.2d 162 (4th Cir. 1989).

When the testimony of a witness is unlikely to be tainted by testimony of other witnesses, the right to a fair trial is not violated. *Hatfield*, at 596.

A. ELICITATION OF HOW EXPERT OPINIONS DIFFER IS NOT PRECLUDED BY ANY EVIDENTIARY RULE OR LAW

While Appellant's own expert witness and two expert witnesses for Appellee observed the testimony of fact witnesses at trial (consistent with the Trial Court's ruling excepting all expert witnesses from sequestration), Appellant claims that it was only testimony from Dr. Shuttleworth that was improper. Plaintiff further incredibly claims that Dr. Shuttleworth "weighed" the testimony of Appellant's expert, Dr. Kodner for the jury.

Dr. Shuttleworth was simply asked if he agreed with certain testimony of Dr. Kodner, and indicated he did not agree. Further, when Dr. Shuttleworth was asked if Dr. Kodner was mistaken about the surgery at Vanderbilt, he indicated that what Dr. Kodner said in the courtroom and what he (Shuttleworth) read in the reports from Vanderbilt was not the same.

Disagreement among experts is routine in medical malpractice trials; otherwise, there would be no reason for a case to go to trial.

A simple statement by an expert that his opinions are "not the same" as the opposing expert does not violate any evidentiary rule or law.

A defendant is allowed to introduce expert testimony to rebut the plaintiff's expert witness.

> Further, the testimony of every witness, including expert witnesses, is subject to attack by impeachment from the testimony of other witnesses.

Sakler v. Anesthesiology Associates, 50 S.W.3d 210, 213 (Ky. App. 2001), citing *Brown v. Commonwealth*, 934 S.W.2d 242, 247 (Ky. 1996).

Plaintiffs are also allowed rebuttal testimony; however, none was presented in this case. Appellant could have had Dr. Kodner remain in the courtroom during Appellee's case in chief, and put him back on the stand in rebuttal. This would have been consistent with the Court's ruling.

If experts are sequestered and are unaware of the factual testimony heard by the jury, the same type questions could, should, and would be asked, only with the preface of a hypothetical. Appellee submits that using hypothetical questions with expert witnesses makes a trial unnecessarily difficult and confusing for the jury.

There was no indirect debate, point and counterpoint, among the experts at trial; the opposing experts simply disagreed. This was not a surprise to anyone, and does not constitute a "weighing" of the evidence.

The Trial Court instructed the jury on the weight to be given the evidence (VR Day 1: 08/20/13; 1:51:03 – 1:57:52) and jurors are presumed to follow such instructions. There has been no argument in this case that the jurors failed to follow instructions.

Even when the Kentucky Supreme Court has found error in failing to separate a witness, the error is harmless when there is nothing to show the testimony was false, fabricated, or factually inaccurate, and the only support for Appellant's position is that the testimony complained of is contradictory to her own. *Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky. 1998).

B. APPELLEE'S EXPERT WITNESS MADE SPECIFIC CONTRIBUTIONS THAT WERE ESSENTIAL TO THE CASE

Appellee did **not** request that his experts be allowed to remain to act as "elbow experts" for cross-examination purposes. Expert witnesses at the trial of this matter observed the testimony of other witnesses from the gallery, and as a result, were able to base their opinions on the same facts the jury heard from the witness stand.

Pursuant to KRE 703(a), experts base their opinions on facts or data made known to them at or before trial.

> (a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

In this rule, there is recognition that expert witnesses (who do not have personal knowledge of the facts) obtain needed facts by hearing the testimony of other witnesses. *See Robert G. Lawson, The Kentucky Evidence Law Handbook*, §6.25(1)(a) at 470 (5th Edition 2013).

Appellee candidly admits that most of the "facts" were known prior to the trial of this matter. While extensive discovery is conducted in most cases (as was here), it is well known that fact witnesses do not always give the same testimony at trial as they give in a discovery deposition. Even if expert witnesses review the discovery depositions prior to trial, there will still be "new" or "additional" facts that come to light during a trial.

As discussed above, Myrna Borders, CRNA, was not deposed for discovery purposes. Both of Appellee's expert witnesses (Dr. Shuttleworth and Dr. Cheadle) were able to observe her testimony "live," which was essential to their opinions presented at trial, as it demonstrated there were no abnormal findings with the Foley catheter and bag during surgery.

This "expected" testimony of CRNA Borders was put to Appellant's expert, Dr. Kodner, by Appellant's counsel with hypothetical; specifically that the CRNA was expected to testify that she was monitoring the Foley catheter and bag during surgery and there was no blood in the urine. Appellant's counsel asked for Dr. Kodner's thoughts regarding this anticipated testimony (VR Day 2: 08/21/13; 01:55:38 – 01:55:15). There was nothing improper about that question.

It should be noted that Appellant claimed Dr. Chapman injured her bladder during surgery. The factual testimony of CRNA Borders provided further support for the defense position that no bladder injury occurred.

It was the position of Appellant's expert, Dr. Kodner, that surgery performed later at Vanderbilt University Medical Center supported Appellant's claim that Dr. Chapman negligently injured the bladder. Dr. Kodner testified he had difficulty understanding the surgery performed at Vanderbilt, but then proceeded to give his opinion, supported by "courtroom made" drawings. Dr. Kodner's drawings were contra to the typed Vanderbilt "operative report."

Dr. Shuttleworth was able to observe this "new" testimony by Dr. Kodner and upon taking the stand during Appellee's case, was able to demonstrate and explain to the jury how he interpreted the records of the Vanderbilt surgery, and how those records demonstrated a lack of negligence on Dr. Chapman's part.

This case is distinguishable from *Spears* in that there were clear contributions to the defense by Appellee's expert witnesses as a result of their exemption from sequestration.

C. THERE WAS NO OBJECTION TO THE TESTIMONY APPELLANT NOW ARGUES WAS IMPROPER

Appellant's arguments are truly contradictory. On the one hand she claims Appellee did not make a proper showing because he did not explain why having his expert present would refute Appellant's theory of the case; on the other hand she argues that Dr. Shuttleworth's testimony containing a clear refutation of Dr. Kodner's theory was improper.

Appellant did not find Dr. Shuttleworth's testimony objectionable at trial; she did not seek to exclude Dr. Shuttleworth as a witness; and she did not otherwise object to him as a witness or ask for an admonition.

Appellant's counsel made a single objection during the entire direct examination of Dr. Shuttleworth, and the question to which the objection was made was withdrawn (VR Day 4: 08/23/13; 11:04:35 – 11:07:33). Dr. Shuttleworth's opinion testimony was also subject to cross-examination by Appellant's counsel.

Appellant also did not present an argument to the Trial Court that Dr. Shuttleworth "weighed" the testimony for the jury, nor did she seek a ruling of any kind from the Trial Court with regard to the "improper" testimony she now claims on appeal.

There was no motion for mistrial, no directed verdict motion, and no post-trial motion of any kind. The Trial Court was not given an opportunity to rule on the specific grounds Appellant now argues on appeal.

> If a different ground is argued on appeal, then the movant has indeed "fed one can of worms to the trial judge and another to the appellate court." In such an instance, the trial court has made no decision related to the specific legal question that is later raised for the first time on appeal.
>
> It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal.

Fischer v. Fischer, 348 S.W.3d 582, 588 (Ky. 2011), citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)

Appellee submits that the failure to object or move to strike the specific testimony of Dr. Shuttleworth of which Appellant now complains is a waiver of the issue and it should not be considered on appeal. *Com. Dept. of Highways v. Spillman*, 489 S.W.2d 814, 816 (Ky. 1973). When a party fails to raise an argument before the circuit court:

> . . . we consider it waived since "[a] new theory of error cannot be raised for the first time on appeal."

Rogers v. Integrity Healthcare Services, 358 S.W.3d 507, 511 (Ky. App. 2012), citing *Fischer*, at 588.

Whether from inaction or consent, almost all issues are subject to waiver. *Commonwealth v. Steadman*, 411 S.W.3d 717, 724 (Ky. 2013) (citing *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999).)

Appellant promptly took advantage of the Court's ruling excepting expert witnesses from separation, and cannot now complain that the ruling was such an egregious error to warrant a new trial. Appellant has not shown that the error she now alleges created any harm that would require such a harsh remedy.

> It is incumbent upon the litigant who seeks reversal of a trial court's judgment to demonstrate to an appellate court that the trial court has committed error which is prejudicial to the substantial rights of the litigant. It is the litigant's duty to preserve for appellate review the error upon which he relies. An orderly administration of justice will not permit appellate courts to reverse trial courts for errors which were not timely brought to their attention.

Bingham v. Davis, 444 S.W.2d 123, 124 (Ky. 1969).

CONCLUSION

Appellee, Darren C. Chapman, M.D., requests that this Honorable Court affirm the ruling of the Hopkins Circuit Court, as there was no abuse of discretion in excepting expert witnesses for both Appellant and Appellee pursuant to KRE 615(3).

Charles G. Franklin
FRANKLIN, GORDON & HOBGOOD
24 Court Street
P. O. Box 547
Madisonville, KY 42431
Phone: 270-821-7252
Fax: 270-821-2360
Email: charliefranklin@bellsouth.net
Counsel for Appellee,
Darren C. Chapman, M.D.